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No. 95-1329

In the

Supreme Court of the United States

October Term, 1995

CONRAD MOCK and BARBARA MOCK,
Petitioners,

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES,
Respondent.

Petition for Writ of Certiorari to the Supreme Court of Pennsylvania

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION AND AMICUS CURIAE BRIEF OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS, CONRAD MOCK AND BARBARA MOCK

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Pursuant to Supreme Court Rule 37, Pacific Legal Foundation (PLF) respectfully moves this Court for leave to file the attached amicus curiae brief in support of petitioners, Conrad Mock and Barbara Mock. Consent to the filing of this brief has been granted by counsel for petitioner and has been lodged with the Clerk of this Court. Respondent, Commonwealth of Pennsylvania Department of

Environmental Resources has withheld consent, necessitating the filing of this motion.

IDENTITY AND INTEREST OF AMICUS CURIAE

Pacific Legal Foundation is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of engaging in litigation in matters affecting the public interest. PLF has over 20,000 contributors and supporters located throughout the Nation and maintains its principal office in Sacramento, California. Policy is set by a Board of Trustees composed of concerned citizens, many of whom are attorneys. PLF's Board evaluates the merits of any contemplated legal action and authorizes such action only where the Foundation's position has broad support within the general community. PLF's Board has authorized the filing of an amicus curiae brief in this matter.

PLF has participated in numerous cases involving issues arising under the Takings Clause of the Fifth and Fourteenth Amendments to the United States Constitution. PLF attorneys were counsel of record in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and PLF participated as amicus curiae in *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 470 (1987); *Hodel v. Irving*, 481 U.S. 704 (1987); *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987); and *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 112 S. Ct. 2886 (1992).

PLF has also participated in numerous lower court cases involving the denial of permission to utilize property designated as a wetland. For example, PLF has participated as amicus curiae in *Loveladies Harbor v. United States*, 21 Cl. Ct. 153, *aff'd*, 28 F.3d 1171 (Fed. Cir. 1994) (upholding $2.6 million damage award for wetlands takings);

and *Florida Rock v. United States*, 21 Cl. Ct. 161 (1990), *rev'd on other grounds*, 18 F.3d 1560 (Fed. Cir. 1994), *cert. denied*, ___ U.S. ___, 115 S. Ct. 898 (1995).

Amicus seeks here to augment the argument in the petition for writ of certiorari. PLF's public policy perspective and litigation experience in support of private property designated as wetlands will provide an additional viewpoint with respect to the constitutional issues presented. Specifically, PLF will demonstrate that the court's interpretation of a rigid application of principles of exhaustion and ripeness is not consistent with that of other jurisdictions. PLF will also show that the court below errs in attempting to find a riparian exception to the established principles of property rights and takings.

DATED: April 19, 1996.

Respectfully submitted,

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INTEREST OF AMICUS CURIAE

The interests of amicus curiae are set forth in the preceding motion and are adopted herein.

OPINION BELOW

The order of the Supreme Court of Pennsylvania, affirming the order of the Commonwealth Court of Pennsylvania, is reported at 667 A.2d 212 (Penn. 1995), and is reproduced as Appendix A attached to the Mocks' Petition

for Writ of Certiorari. The Commonwealth Court decision is reproduced in Petitioners' Appendix C and the Environmental Hearing Board (EHB) Adjudication at Appendix E.

STATEMENT OF THE CASE

Conrad and Barbara Mock made the mistake in 1963 of investing in a 5.2 acre parcel of undeveloped land. Little did they know that the presence of wetlands on the property would prevent them from developing it in a manner similar to several highly developed surrounding properties. *See* Petitioners' Statement of the Case at 3, EHB Adjudication, Appendix E at 34a. They also did not guess that the nature of their property as *riparian* land would be used by the Pennsylvania EHB to help justify its denial of compensation for a regulatory taking. Yet that circumstance, along with the fact that they did not spell out their investment plans in 1963, is what led the EHB to decide that the Mocks were not entitled to relief when their permit was denied:

> The board was persuaded that the Mock's investment-backed expectations were not destroyed, because they never introduced evidence of what their expectations were when they purchased the property in 1963 or afterwards, and because riparian land has been "the subject of regulation for centuries."

Opinion of the Commonwealth Court of Pennsylvania filed March 25, 1993 (Opinion), reproduced in Petitioners' Appendix C at 13a. The Mocks appealed the Environmental Review Board's adverse decision to the Commonwealth Court of Pennsylvania, which upheld the board's decision on several significant grounds. There was one dissent. *See* Petitioners' Appendix D. The majority found first that although the property is valueless in its present undeveloped state, it *might* obtain some value if it were developed. Opinion at 17a to 18a. Petitioners object to this conjecture

because the uses suggested by the court, which included a hospital or retail shop, were unrealistic in view of the board's intent to deny ***all*** projects requiring significant filling of the wetland. *See* Petition at 5-7 (showing that so long as a suggested use could be located elsewhere in the community (on drier land) it would be denied on the Mocks' property).

Second, the court found that the regulation did not constitute a "physical invasion" of Mocks' property. Opinion at 21a. Third, the court found that the Mocks had not proven that their "reasonable investment backed expectations" had been interfered with because they had not shown what their plans were in 1963, because the land was riparian, and because it was within a floodplain. Opinion at 23a. Finally, the court rejected the reasoning of the Court of Federal Claims in two wetlands takings cases which had found that permit denials constituted a taking. Opinion at 24a (discussing *Formanek v. United States*, 26 Cl. Ct. 332 (1992), and *Loveladies Harbor v. United States*, 21 Cl. Ct. 153, *aff'd*, 28 F.3d 1171 (Fed. Cir. 1994)).

The Pennsylvania Supreme Court summarily affirmed the Commonwealth court opinion without comment. *See* Petitioners' Appendix A.

SUMMARY OF ARGUMENT

The order of the Pennsylvania Supreme Court conflicts with established takings doctrine in several federal circuits. This brief will focus on two of those conflicts. The first key area of departure is the court's finding that the Mocks had not properly ripened their claim by not applying for permits to put the property to certain alternative uses. These alternatives are illusory and would be futile to pursue. Several federal circuits have adopted more meaningful tests for determining whether or not a claimant has adequately exhausted available administrative remedies in order to ripen a claim.

The second area of concern is the notion that because the subject land is "riparian" and in a floodplain, the owners, who bought the property in 1963, should have expected that any permit applications might be denied, and that they therefore had fewer reasonable investment-backed expectations to use the property, and thus a less viable takings claim. This reasoning serves to redefine the underlying property rights of the Mocks in a manner proscribed by this Court.

ARGUMENT

I

THE PENNSYLVANIA COURT ERRS BY MISCONSTRUING THE REQUIREMENT THAT A CLAIM BE RIPE BEFORE THERE CAN BE A TAKING

The Pennsylvania Court determined that the Mocks' claim for inverse condemnation had not ripened because there was a theoretical possibility that some sort of permit would have been granted which could have provided the Mocks with some economic return on their property. Finding that there was "no evidence in the record that the land cannot be put to economically viable use," Opinion at 22a, the court put the burden on the Mocks to prove a negative. Yet this requirement is contrary not only to the facts in this case, but is also in conflict with many courts which have considered how many times a property owner must go to a dry well before concluding that the well is dry.

A. On the Record of This Case, It Is Clear That the State Would Not Grant a Permit Enabling the Mocks to Make Reasonable Economic Use of Their Property

There can be little question that the well was dry in this instance. The Mocks explored alternatives suggested by the state, but found that these would either not make economic sense or would still require the filling of wetlands. EHB Adjudication, Petitioners' Appendix E at 43a-44a, Nos. 48, 49, 50, 51, 48a.

It is also clear from the record that any filling of the wetlands, for uses that were not "wetland-dependent" would have been denied. As petitioners note, the policy of the Department of Environmental Resources (DER) is to not grant a permit for filling a wetland when there are alternative sites in the community for the desired use--regardless of who owns the alternative site. *See* Petition for Certiorari at 7 (quoting testimony of Richard Shannon, DER, indicating that as long as any available alternative upland sites are available for a project, a wetland development permit will not be granted). *See also* EHB Adjudication, Appendix E at 47a-48a, concluding that the Mocks failed to adequately consider alternatives because they did not consider putting an auto repair shop elsewhere in the community. Reliance on the Mocks' failure to consider moving the repair shop, of course, begs the question of whether economically viable use of the *site* has been destroyed. Furthermore, there is nothing in the record suggesting that any sort of wetland-dependent use would have been feasible (or approved).

With respect to the Commonwealth Court's reliance on the EHB finding that because the Mocks "did not seek approval for a smaller facility, we cannot conclude that they will be denied ***any*** use of the facility," Opinion, Appendix C at 13a (emphasis added), it is misplaced. First, as noted, the record is clear that no economically feasible use will be

granted. Second, the emphasis on "any use" ignores the potential of, and has denied the Mocks' ability to prove, that neither economically beneficial nor productive use remains feasible or that there has been a complete taking of a portion of the property, *see Lucas v. California Coastal Council* 505 U.S. 1003, 112 S. Ct. 2886, 2894 n.7, or a partial taking of the whole property, *id.* at 2895 n.8; *see also* John E. Fee, Comment, *Unearthing the Denominator in Regulatory Takings Claims,* 61 UNIV. of CHICAGO L. REV. 1534 (1994).

Thus, despite claims from the state and the Pennsylvania court that the Mocks should have explored additional alternative uses and applications, it is clear that the Mocks ***did*** explore such alternatives and that they would have been denied in any event.

B. The Pennsylvania Court's Decision Is in Conflict with Other Circuits That Have Adopted a Futility Limitation to the Requirements of Exhaustion and Ripeness

The notion that a property owner must apply for permits when it is clear that no permits to put the property to any feasible use will be forthcoming conflicts with the holdings of the Court of Federal Claims, and the Ninth and Eleventh Circuits where landowners are *not* required to apply for permits that clearly would not be forthcoming. In other words, a property owner who is unlucky enough to have property taken by a regulatory agency *in Pennsylvania* will not be able to obtain relief nearly as readily, if at all, as a property owner in other parts of the country or in some federal courts.

There is a substantial conflict between the Pennsylvania courts and the Court of Federal Claims which has ruled *for* landowners in similar circumstances. For example, in *Florida Rock v. United States,* 21 Cl. Ct. 161 (1990), *rev'd on other grounds,* 18 F.3d 1560 (Fed. Cir. 1994), *cert.*

denied, ___ U.S. ___, 115 S. Ct. 898 (1995) (*Florida Rock* II), the trial court was confronted with a takings claim by a property owner who was denied a permit to use wetlands for limestone mining. In response to government arguments that the owner should have submitted alternative permits, the trial court found "'[i]t would serve no purpose to require claimant to exhaust administrative procedures before seeking judicial review when it is clear that resort to administrative action would be futile.'" *Id.* at 170 (quoting *Conant v. United States*, 12 Cl. Ct. 689, 692 (1987)). Or, as noted by the Federal Circuit in an earlier proceeding responding to the argument that the Corps of Engineers might grant Florida Rock a permit to mine 1,560 acres after denying a permit to mine 98 acres: "We do not think that the mere possibility a permit might be granted, like the possibility one might put a pot of water on a hot stove and have it freeze, is a reality." *Florida Rock v. United States*, 791 F.2d 893, 904 (Fed. Cir.), *cert. denied*, 479 U.S. 1053 (1986) (*Florida Rock* I).

Similarly, the trial court in *Loveladies Harbor v. United States*, 15 Cl. Ct. 381 (1988) (*Loveladies* I) (denying summary judgment for government in taking claim against government for failure to grant a wetlands permit); 21 Cl. Ct. 153 (1990) (*Loveladies* II) (awarding $2.6 million in takings damages); *aff'd*, 28 F.3d 1171 (Fed. Cir. 1994), refused to require the applicant to pursue any additional permit applications once it became clear that the property could not be put to economic use. The trial court found that the plaintiff should not be forced to resort to "some endless series of requirements." *Loveladies* I, 15 Cl. Ct. at 386. The court also considered and promptly rejected suggestions (which were ridiculous in light of the property's location and proximity to residential development) from the Corps of Engineers that the property could be put to some other economically viable use, such as farming or hunting. *Loveladies* II, 21 Cl. Ct. at 158-59. On affirming the

decision, the Federal Circuit agreed that economically viable use had been denied on the facts of the case. 28 F.3d at 1182.

In *Whitney Benefits, Inc. v. United States*, 926 F.2d 1169 (Fed. Cir.), *cert. denied*, 502 U.S. 952 (1991), the court rejected the proposition that the owner of a coal mine had to apply for permits which would have surely been denied under the law. As the *Whitney* case was ably summarized by the same court later in *Loveladies* II, "the regulatory enactment, the Surface Mining Control and Reclamation Act of 1977, had its intended effect, precluding the surface mining of plaintiff's coal field because of the overlying alluvial valley floor. This was based on extensive fact finding by the trial court regarding the purpose of the imposition, the nature of the property, its alternative uses, and the extent to which all or only a portion of plaintiff's property was so limited." *Loveladies* II, 28 F.3d at 1181. The appeals court in *Whitney Benefits* rejected arguments by the government that the plaintiff had to apply for additional permits. It noted that the coal mining statute at issue "expressly provides that 'no permit shall be approved' under conditions precisely descriptive of the Whitney coal estate.'" *Whitney Benefits*, 926 F.2d at 1171. The court concluded that an application would be "futile" and "absolutely foredoomed." *Id.* at 1172.

The Ninth Circuit has, on occasion, applied the futility exception to constitutional challenges to zoning decisions. In *Herrington v. County of Sonoma*, 834 F.2d 1488 (9th Cir.), *modified* at 857 F.2d 567 (1988), the court, after first noting that it would apply the same ripeness considerations in due process and Equal Protection Clause challenges to zoning ordinances as this Court applied in the context of takings challenges, 857 F.2d at 569, held that it would be "inappropriate to require the Herrington's to have formally completed a hopeless application." 857 F.2d at 569. Instead the court adopted the "one meaningful application" rule,

meaning that a landowner cannot plead futility until he has filed at least one meaningful application. The court thus allowed the Herringtons to pursue a claim despite the fact that their permit had been rejected in the ***preliminary*** stage: "Under the circumstances of this case, it would be inappropriate to require the Herringtons to have formally completed a hopeless application." *Id.*[1]

Similarly, in *Hoehne v. City of San Benito,* 870 F.2d. 529, 534-35 (9th Cir. 1989), the court held that a landowner need not make an additional rezoning application when it was clear that it would be "futile." *But cf. Kinzli v. City of Santa Cruz*, 818 F.2d 1449 (9th Cir.), *amended* at 830 F.2d 968 (1987), *cert. denied,* 484 U.S. 1043 (1988) (the court declined to apply the futility exception when an applicant had claimed that under the existing regulatory regime no application could possibly result in a marketable property. The court, while agreeing that the futility exception existed, thought it unwise to speculate on the "marketability" of an affected property without the benefit of a permit denial.). *See also Zilber v. Town of Moraga,* 692 F. Supp. 1195, 1199 (N.D. Cal. 1988) (finding that the Ninth Circuit's futility rule in *Kinzli* is "harsh and counterintuitive" but still controlling).

In the context of a takings challenge to a rent control regulation, the Ninth Circuit has on several occasions held that the ripeness doctrine does not require futile procedures. For example, in *Sierra Lake Reserve v. City of Rocklin*, 938 F.2d 951, 957 (9th Cir. 1991), *vacated on other grounds*, ___ U.S. ___, 113 S. Ct. 31 (1992), the court

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[1] The Ninth Circuit also did not require the Herringtons to apply for a variance: "Nevertheless ... application for a variance–need not be met in this case because pursuit of a variance was not a legally viable option." *Herrington*, 857 F.2d at 569-70.

found there was no need to pursue futile California state court remedies in a mobile home rent control takings case as a prerequisite for pursuing a federal claim. *Accord Azul Pacifico, Inc.* v. City of Los Angeles, 948 F.2d 575 (9th Cir. 1991), *on reconsideration*, 973 F.2d 704 (9th Cir. 1992), *cert. denied*, ___ U.S. ___, 113 S. Ct. 1049 (1993).

The "one meaningful application" rule was also followed by the Eleventh Circuit in *Eide v. Sarasota County*, 908 F.2d 716, 726 n.17 (1990). The Eleventh Circuit has also noted that "[i]n most cases, no 'final decision' has been reached until an aggrieved landowner has applied for at least one variance to a contested zoning ordinance." *Reahard v. Lee County*, 30 F.3d 1412, 1415 (11th Cir. 1994).[2] The Eleventh Circuit has also held that only one application need be made in an analagous substantive due process challenge where evidence showed that the only alternative to a rezoning was the existing zoning. The city failed to prove that any use other than the particular zoned use would be permitted. *Greenbriar v. City of Alabaster*, 881 F.2d 1570, 1576 (11th Cir.), reh'g denied, 893 F.2d 346 (11th Cir. 1989) ("The City has effectively conceded that the only alternative plan of development would have been under the existing zoning. As there is no uncertainty regarding the level of development that would be permitted ... [a] reapplication requirement serves no purpose here.")[3] Thus, the Eleventh Circuit's holding conflicts with the argument of the Pennsylvania Commonwealth court that the owner must prove a negative.

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[2] The *Reahard* decision ultimately found that a *federal* takings case was not ripe for failure to exhaust *state* takings remedies.

[3] The court considered ripeness for a due process claim in the same analytical framework as for takings claims. *Id.* at 1573-74.

C. The Decision of the Pennsylvania Court Does Not Follow from This Court's Precedents Regarding Ripeness

Furthermore, the hypercritical application of the ripeness doctrine against the Mocks is not consistent with this Court's decisions in *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172, 186-94 (1985), and *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 352 (1986).

In *Hamilton Bank*, noting that "a claim that the application of government regulations effects a taking of a property interest is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue," 473 U.S. at 186, the Court found a takings claim not ripe because the applicant had not applied for a variance. In the case of the Mocks, the record is devoid of reference to any available variance procedures. And, as noted above, the alleged opportunity to apply for new permits is a chimera. In *MacDonald* this Court found a takings claim not ripe because there was "open the possibility that some development will be permitted." *MacDonald*, 472 U.S. at 352. However, the property in *MacDonald* was zoned for residential development and the state appellate court concluded that some significant development *could* be approved--but just not the particular 159-unit subdivision development applied for. *Id.* at 346-47.[4] No such possibility existed for the Mocks.[5]

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[4] *MacDonald*, as noted by the dissent, was a close question because the developer's allegations that further applications would be futile. 477 U.S. at 390 (J. White, dissenting). However, the county asserted further applications might be granted. Here, the policies and testimony of the state agency make it clear that it would be futile to apply for any significant use of the riparian parcel.

D. The Pennsylvania Court's Insistence That the Mocks Apply for Additional Permits Conflicts with This Court's Pronouncement That Government Has the Burden of Proof in Certain Takings Cases

It was conceded by the court that Mocks had proven that their permit application had been denied and that the value of the property without a permit would be zero. Opinion at 22a. But the court continues to place the burden of proof on the Mocks to prove that no other permit would be granted. Placing of the burden on the Mocks ignores this Court's holdings on the burden of proof in takings cases.

In the context of a regulatory taking, once a claimant has made at least a prima facie case that the individual application of a land use restriction takes property, then the burden of proof should shift to the government to prove that its regulatory action, as applied to an individual landowner in an adjudicative decision, does not constitute a taking. *In Dolan v. City of Tigard*, 512 U.S. ___, 114 S. Ct. 2309, 2320 n.8 (1994), this Court found that Mrs. Dolan's case was not a challenge to a generally applicable zoning ordinance (where a landowner has the burden of proving that the legislative act arbitrarily regulates property rights). Instead, it dealt with a government regulation of property applied in an "adjudicative decision" on an individual building permit condition. There the burden shifts to the government to prove that there has been no taking. *Id.*

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[5] For two illuminating discussions of the doctrinal and practical difficulties presented by overzealous adherence to ripeness rules in the context of takings claims, *see Timothy Kassouni, The Ripeness Doctrine and the Judicial Relegation of Constitutionally Protected Property Rights*, 29 CALIFORNIA WESTERN L. REV. 1 (1992); and Michael Berger, *The Ripeness Mess in Land Use Cases or How the Supreme Court Converted Federal Judges into Fruit Peddlers*, 1991 Institute on Planning, Zoning, and Eminent Domain, Ch. 7 (Sw. Legal Found. 1991).

Here, the Mocks have had their land use application denied leaving the property without value. For all practical purposes, any use of their property has been conditioned on the Mocks' willingness to forego touching all but a tiny fraction of the land that is not accessible or commercially useful. Adjudication, Appendix E at 43a-44a, Paragraph 50. The Mocks have made a prima facie case that their land has been taken. The burden is now on the government to prove otherwise, not on the Mocks to engage in a process of endless applications to prove again and again that no permit would ever be issued.

II

THERE IS NO "RIPARIAN LAND" EXCEPTION TO THE TAKINGS DOCTRINE

In *Lucas,* the State of South Carolina argued that David Lucas had no right to build on his land because it was beachfront property where all building was a nuisance-like activity. This Court doubted that assertion was correct and remanded the case for a determination of whether building a beachfront home was a nuisance in South Carolina. 112 S. Ct. at 2901-02. On remand, the South Carolina Court found that there was no such nuisance. *Lucas v. South Carolina Coastal Council*, 424 S.E.2d 484 (S.C. 1992).

Like David Lucas, the Mocks have never disputed that they are subject to reasonable regulations. However, the Pennsylvania court carved out a special rule for owners of riparian land, alleging that they should expect to be so highly regulated that they necessarily lack (unless they are able to prove otherwise) "reasonable investment backed expectations" to develop their land. Thus, the court recited EHB's finding that the Mocks' "investment-backed expectations were not destroyed, because they never introduced evidence as to what their expectations were ... because riparian land has been 'the subject to regulation for centuries.'" Opinion

at Appendix C, 13a. And later in its opinion the court proceeded to find that

> [a]s to the Mocks' future plans, we further agree with the board that the Mocks could not reasonably expect to develop their land free from government regulation because it is riparian land which has been subject to regulation for centuries.

Opinion at 23a. This statement undercuts the principle that the landowners can expect to put their property to economically viable use. *See Nollan v. California Coastal Commission*, 483 U.S. at 833 n.2 (there is a ***right*** to build on property). More significantly, however, the Court is carving out an exception to the takings doctrine by claiming that it can ***never*** be assumed that owners of riparian or floodplain land can have reasonable investment-backed expectations to use their land.[6]

To be sure, owners of riparian property may be subject to greater regulation than others. *Lucas*, 112 S. Ct. at 2900. However, this fact has never been seen to countenance a denial of economically viable use of property, especially when the use is consistent with preexisting uses of neighboring riparian properties and when the government is not using the riparian lands for the purpose of accessing navigable waters--which is the limiting parameter for the navigational servitude exception for riparian land. *See Kaiser Aetna v. United States*, 444 U.S. 164, 177 (1979). Indeed, in *Kaiser Aetna* the Court found the riparian land exception did not apply:

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[6] The Pennsylvania Court, Opinion at 13a, cites to *White v. Pennsylvania Railroad Co.*, 47 A.2d 200 (1946), for the proposition that riparian land has been "subject to regulation for centuries." But *White* dealt with a landowner blocking a natural watercourse, damaging neighboring land. It was not a takings case. Neither it nor any other cited case stands for the proposition that landowners in Pennsylvania may not develop riparian land.

> Here, the Government's attempt to create a public right of access to the improved pond goes so far beyond ordinary regulation or improvement for navigation as to amount to a taking under the logic of *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922).

Kaiser Aetna, 444 U.S. at 178. Similarly, in *Loveladies Harbor*, the federal circuit was unimpressed by arguments that the existence of modern wetlands regulations trumps an owner's investment-backed expectations for previously acquired property: "It is important to note that Loveladies purchased the property with the intent to develop it long before these particular state and federal regulatory programs came into effect." *Loveladies Harbor* II, 28 F.3d at 1183. Similiarly, the Mocks purchased their property in 1963, long before today's heightened awareness and regulation of wetlands. *Kaiser Aetna* and *Loveladies* are both clearly at odds with that of the Pennsylvania court.[7]

Indeed, by discovering a newly expanded riparian land exception to the takings doctrine, the court is following a growing trend to redefine property rights in order to minimize the potential of a governmental taking. *See, e.g., Stevens v. City of Cannon Beach*, 854 P.2d 449 (1993), *cert. denied*, ___ U.S. ___, 114 S. Ct. 1332 (1994) (dissent by Scalia, J., expressing concern over the extension of the "public trust doctrine" to what had previously been

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[7] In contrast to the Pennsylvania court's emphasis on the Mocks' land being in a floodplain, the Ninth Circuit has held that the fact that land is in a floodway does not by itself defeat a takings claim. "[Allegations that] the County, for illegitimate reasons, has deprived the McDougals of all economically viable uses of their property in designating it a floodway and in denying their application for a conditional use permit for retaliatory reasons ... state a claim for compensation for a regulatory taking." *McDougal v. County of Imperial*, 942 F.2d 668, 680 (9th Cir. 1991).

considered private property); *Nansay Hawaii, Inc. v. Public Access Shoreline Hawaii*, 903 P.2d 1246 (Haw. 1995), petition for certiorari pending, 64 U.S.L.W. 30 d 96 (extending "custom" of "gathering rights" to all persons with native Hawaiian blood and expanding that custom to allow native Hawaiians to restrict land development).

The notion that property rights can be defined anew, however, flies in the face of this Court's warning in *Lucas v. South Carolina Coastal Council*, "if the protection against physical appropriations of private property was to be meaningfully enforced, the government's power to redefine the range of interests included in the ownership of property was necessarily constrained by constitutional limits." *Lucas*, 112 S. Ct. at 2892. Similarly, in *Hughes v. State of Washington*, 389 U.S. 290 (1967), Justice Stewart warned that "a State cannot be permitted to defeat the constitutional prohibition against taking property without due process of law by the simple device of asserting retroactively that the property it has taken never existed at all." 389 U.S. at 296-97 (Stewart, J., concurring.) *See also Chicago, Burlington & Quincy Railroad Co. v. City of Chicago*, 166 U.S. 226, 233-34 (1897) (potential of a "judicial takings" mentioned).

The Pennsylvania courts must be restrained from creating an expansive new riparian or floodplain land exception to the takings doctrine.

CONCLUSION

Property ownership carries with it certain rights, such as the right to make reasonable and beneficial use of land. Property owners should not be subjected to an endless series of circus hoops before they can hope to exercise that right or present a claim for relief after use of the property is denied by the governmental body. Actions by state courts that redefine property rights to benefit the public at the expense

of individual landowners must be closely monitored by this Court.

For these reasons, it is appropriate and timely that this Court grant certiorari in order to provide the needed consistency and guidance to the lower courts.

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Respectfully submitted,

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